

IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

SPECIAL CIVIL APPLICATION No 6226 of 1996

For Approval and Signature:

Hon'ble MR.JUSTICE M.S.PARIKH

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1. Whether Reporters of Local Papers may be allowed to see the judgements?
2. To be referred to the Reporter or not?
3. Whether Their Lordships wish to see the fair copy of the judgement?
4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder?
5. Whether it is to be circulated to the Civil Judge?

ZOROASTRAIN CO OPERATIVE HOUSING SOCIETY LTD

Versus

DISTRICT REGISTRAR CO OP. SOCIETIES (URBAN)

Appearance:

MR MIHIR H JOSHI for Petitioners

MR AJ PATEL with MR RAVINDRA SHAH for Respondent No. 1

MR SHIRISH JOSHI for Respondent No. 3

SERVED BY DS for Respondent No. 4

CORAM : MR.JUSTICE M.S.PARIKH

Date of decision: 16/01/97

JUDGEMENT

1. The petitioner no.1, a co-operative housing society registered under the Bombay Co-operative Societies Act, 1955, and petitioner no.2 a member and the President of the petitioner no. 1 society have invoked extra-ordinary jurisdiction of this Court under Article

226 as also under Article 227 of the Constitution of India seeking following reliefs :-

- "(A) .. be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other appropriate writ, order or direction quashing the directions of the 1st respondent vide letters dated 2/5/1995 at Annexure-N hereto and 16/8/1995 at Annexure-O hereto,
- (B) .. be pleased to issue a writ of certiorari or a writ in the nature of certiorari or any other appropriate order or direction quashing and setting aside the orders dated 28/5/1996 of the learned Nominee at Annexure-K hereto and that of the Tribunal dated 8/8/1996 at Annexure-L hereto and be pleased to further restrain the respondents nos. 2 and 3 and/or their agents for putting up any construction on plot no. 7 of the petitioner-society without permission of the petitioner-society,
- (C) .. be pleased to issue a writ of prohibition or a writ in the nature of prohibition or any other appropriate writ, order or direction restraining the respondent no. 1 from proceeding further with the appeal filed by the 2nd respondent u/S. 24 of the Gujarat Co-operative Societies Act against rejection of transfer of membership vide application dated 18/6/1996,
- (D) .. be pleased to issue a writ of mandamus or a writ in the nature of mandamus or any other writ, order or direction declaring the transfer of plot no. 7 by respondent no. 2 to the respondent no.3 as contended by respondent no. 2 as being illegal, void, non-est and not binding on the petitioner-society."

2. Broad facts on which the petitioners have sought the indulgence of this Court may be stated from the synopsis of dates and events :

The petitioner-society was registered under the Bombay Co-operative Societies Act with the object of constructing houses and it is the say of the petitioners that bye-laws were framed restricting membership to Parsis. It is the further say of the petitioners that the objects of the petitioner-society also included construction of houses meant for the purpose of residence. On or around 26/9/1985 the respondent no.2, a member of the petitioner no.1-society gave application to

construct residential-cum-commercial building on plot no. 7 occupied by him as the member, after demolishing his existing residential building. On or around 4/8/1986 such permission came to be rejected by the society on the ground that the commercial use was prohibited under the bye-laws. It is the say of the petitioners that such a stand was accepted by the respondent no.2. On or around 10/3/1988 second application for development was made for construction of ground floor plus nine floors (56 blocks) by the respondent no. 2 for constructing residential accommodation. It is the case of the petitioners that on 17/5/1988 conditional permission for development was granted inter-alia saying that the flats would be allotted for residential accommodation of Parsis, that the respondent no. 2 would be continued to be member of the society in respect of plot no. 7 and that additional taxes, if any, would not be borne by the petitioner no. 1-society.

3. It is asserted by the petitioners that nothing was done by the respondent no. 2 pursuant to the aforesaid permission till may 1995 i.e. for a period of 7 years. However, apprehending transfer of plot no. 7 by the respondent no. 2 and construction of residential-cum-commercial complex, the petitioner no. 1 society filed a suit before the Board of Nominees bearing Lavad Case No. (Arbitration suit no.) 570 of 1995. The learned Board of Nominee granted order of status-quo in the said suit. He, however, after hearing the learned advocates for the parties to the suit vacated the status-quo by order dated 28/5/1996. The matter was carried before the Gujarat State Co-operative Tribunal at Ahmedabad in Revision Application No. 112/1996. In that Revision Application an application for stay bearing exh. 5 was moved by the petitioner no. 1 society and after hearing the said stay application learned Member of the Tribunal by his speaking order dated 8/8/1996 dismissed the stay application exh. 5 at that stage. As stated above the petitioners have challenged the aforesaid two orders, namely the order of the Board of Nominee and the order passed by the Tribunal, before this Court in this petition.

4. In the meantime on or around 2/5/1995 the Registrar issued direction to the petitioner no. 1 society to delete the condition of permission granted by the society restricting development of residential accommodation only for the Parsis. Reference has been made to page 89 in this connection. The second direction came to be issued by the Registrar on or around 16/8/1995 to delete the condition as aforesaid and to grant

application for the transfer of the plot by the respondent no.2. It is the stand of the petitioners that at both the relevant points of time there was no application for transfer of membership pending before the society. However, on 18/6/1996 the respondents nos. 2 and 3 filed an application for transfer of membership in respect of plot no. 7 and since the proposed transfer was contrary to the bye-laws of the society and the provisions of the Gujarat Co-operative Societies Act, 1961 (Gujarat Act No. 10 of 1962) 'the Act for short', the petitioner no. 1- society rejected the application on 24/6/1996. The respondents nos. 2 and 3 filed appeal against the said rejection of transfer of membership, by the petitioner no. 1 - society, before the District Registrar (respondent no. 1 herein) u/S. 24 of the Act. The petitioner no. 1- society received summons in respect of the said appeal on or around 13/8/1996. Apprehending that the District Registrar being the appellate authority, whose one of the officers, namely Registrar, had earlier issued directions to the petitioner no. 1 society to delete the condition of permission granted by the society restricting development of residential accommodation only for Parsis, the petitioners have challenged the pending proceedings u/S. 24 of the Act before the District Registrar as can be seen from the reliefs quoted hereinabove.

5. There being a caveat from the respondent no. 2, the respondent no. 2 was heard at the admission and following order was passed :-

"Heard.

Rule returnable on 3/9/1996.

Learned counsel Mr. Patel waives service on behalf of respondent no.2. Issue notice to the remaining respondents.

In the meanwhile the parties are directed to maintain status-quo as on today.

D.S."

After the matter was admitted as aforesaid the respondent no.2 filed affidavit in reply dated 27/8/1996 raising the questions with regard to maintainability of the petition on the ground that interim orders have been challenged in this petition and that pending proceedings have also been called in question. Challenge is also levelled on the ground of multifariousness and availability of alternative remedies. It is the say of the respondent no. 2 that he had filed written statement on 9/8/1995 in the Lavad Case filed by the petitioner no. 1 - society and he inter-alia contended that the property in question

was transferred to a non-trading corporation, who was not impleaded as a party. It is asserted that the geographic position of the society is such that it would not be possible to contend that admission of non-Parsis as members would disturb or hamper the ethic atmosphere of the society. The society is divided into 4 different parts and each part constitutes an independent division having no connection with the other division. There are various high-rise buildings around the petitioner-society. It is the stand of the respondent no.2 that the members of the petitioner-society have been carrying on and running various commercial activities in the society. The President of the society himself is running a motor garage where many oil tankers and heavy vehicles are parked. Other members are also carrying on commercial activities. The respondent no.2 got the plans approved from the Ahmedabad Municipal Corporation on or around 22/9/1996 and spent about Rs.8,19,587/- towards the conversion, licence fees, security deposits, parking deposit and other charges. The respondent no.3 filed affidavits dated 2/9/1996 and 7/11/1996 raising the same contentions as have been raised by the respondent no.2. The respondent no. 3 asserted that no writ could be issued to the respondent no. 3 as respondent no. 3 could not be covered under Article 12 of the Constitution of India. It is finally asserted by the respondent no. 3 that even the very existence of the disputed bye-law restricting transfer only in favour of Parsis is under dispute in the Lavad suit. The respondents have therefore sought dismissal of the writ petition.

6. I have heard the learned advocates appearing for the rival parties. The principal question stated to arise in this petition is whether the petitioner no.1 society is within its rights in refusing permission for commercial development in a co-operative housing society and rejecting application for transfer of membership in favour of non-Parsis. The impugned orders and the proceedings which have been challenged in this petition basically rest upon a prima-facie conclusion on the question whether any such bye-law, if in existence, can be said to be legal and valid.

7. The bye-law alleged to be in existence is the bye-law no.7. It would read as under :-

"7. All persons, who have signed the application for registration are original members. Other members shall be elected by the committee provided that all members shall belong to the parsi community."

8. Both the learned Nominee and the Member of the Tribunal have answered the question against the petitioner no.1- society holding that the aforesaid bye-law is unconstitutional and illegal in as much as it absolutely bars transfer of membership/transfer of members' right to immovable property. The provisions of the Constitution of India and the provisions of the Act and the Rules made under the Act as well as the Transfer of Property Act came to be canvassed before the lower adjudicating authorities. It has been concluded that the property in housing society is heritable and transferable and bearing in mind the principle of open membership u/S. 24 of the Act read with rule 12(2) of the Rules, which has been held intra vires by a Division Bench of this Court in Jain Merchants Co-op. Housing Society Ltd. v/s. H.U.F. of Manubhai reported in 36(1) G.L.R. p. 19, there is no prima-facie case for restraining the transfer to a non-parsi. With regard to construction of flats it has been held on prima-facie consideration of the facts that the plans have been signed by the respondent no. 2 and none else and that bearing in mind the petitioner no.1 society's letter dated 17/5/1988 it would be lawful for the flats being constructed in the plot/property held by the respondent no.2. It has been held that since the plans have been approved by the local authority the construction according to plans cannot be restrained. The respondent no.3 being not a party to either of the proceedings before the learned Nominee or the learned Tribunal, no order could be passed in favour of or against the respondent no.3. However, at that interim stage the application exh. 5 for granting status-quo/stay was dismissed pending the revision application before the Tribunal.

9. It has been submitted on behalf of the petitioners that the impugned orders of the learned Nominee and the learned Tribunal are not legal and they deserve to be quashed for the following reasons :-

(A) Any construction by the 3rd Respondent is illegal and the society is entitled to injunction

(i) Respondent No.3 is not entitled to become a member of the society as per its bye-laws and as contemplated under the Act vide Sections 22, 24 and Rule 11, 12 and 18 of the Rules and has not been accepted as member of the society and is therefore not entitled to put up any construction on the plot of respondent no.2.

(ii) In any case construction of residential-cum-commercial complex is contrary to the bye-laws of the society and against the conditional grant of permission dated 17/5/88 and contrary to Art. 19(1)(c) of the Constitution.

(iii) Such development would seriously jeopardise the fragile culture of the Parsi community which has a worshipping place adjacent thereto and community activities like Charitable blocks, etc. being carried on.

(B) In any case respondent no. 2 cannot at all claim a right to transfer the membership to respondent no.3 or to construct residential cum commercial complex for the following reasons :-

(i) The Bye-laws of the society prohibit such action and respondent no.2 is bound by the same.

(ii) Respondent no.2 has accepted rejection of the first application for commercial development and in the second application has applied for permission for residential accommodation to be allotted to Parsis and accepted the condition placed by the society and is therefore, estopped and precluded from claiming otherwise.

(iii) The society has resolved on 8/4/68 as well as on 26/1/94 to transfer membership only to Parsis and in fact in the last 70 years of its existence there has been not a single instance of transfer to Non-Parsis and the respondent no.2 is therefore bound by the same.

(iv) The respondent no.2 cannot claim to transfer his membership as a matter of right since the right to property is subject to limitations by law and is not absolute and the provisions of the Act more particularly sections 22, 24, 30, 31 and Rules 5, 7, 11, 12, 18 and 19 indicate the truncated nature of the right which has to be exercised within the parameters.

(C) The orders ignore principles of prima facie case, balance of convenience and prospect of undue and irreversible hardship if respondent no.2 and/or respondent no.3 are permitted to construct residential cum commercial complex and the injunction is not granted."

10. In reply the following provisions of the Act and the Rules have been read before this Court :-

Section 2(2) of the Act defines "bye-laws" as having been registered under the Act and would include such bye-laws as having been amended from time to time. It has been submitted that bye-laws should be in conformity with the provisions of the Act and the Rules. It has also been submitted that the bye-laws are the species of a contract as among the members of the society and it has no statutory flavour. In fact this submission arises from the settled position of law with regard to nature of bye-laws. Reference in this connection may be made to a decision of the Apex Court in the case of Co-operative Central Bank Ltd and ors. v/s. Additional Industrial Tribunal, Andhra Pradesh, Hyderabad and ors. reported in AIR 1970 SC 245, which has been referred to by a learned Single Judge in B. Anjaneyulu v/s. V.G. Raghunathan reported in 1995 C.T.J. 201.

Section 2(13) defines a "member" of a society. It would read as under :-

"member" means a person joining in an application for the registration of a co-operative society which is subsequently registered, or a person, duly admitted to membership of a society after registration, and includes a nominal, associate or sympathiser member.

Section 22 elaborates the different types of members of a co-operative society. Reference has been made to sub-section (1) clause (b) of the said provision, according to which a firm, company or any other body corporate constituted under any law for the time being in force or a society registered under the Societies Registration Act, 1860 would be included. Even a group of individuals or a Hindu Undivided Family can be member of a society. Reference in this connection may be made to a division bench decision of this Court in Jain Merchants Co-op. Housing Society Ltd. (supra).

Section 4 of the Act deals with the societies which might be registered under the Act. The provision reads as under :-

"4. A society, which has as its object the promotion of the economic interests or general welfare of its members or of the public in accordance with co-operative principles, or a society established with the object of

facilitating the operations of any such society,
may be registered under this Act"

Section 8 deals with application for registration of a society to be made before the concerned authority. Section 12 deals with classifications of the societies and the provision would read as under :-

"12. The Registrar may classify all societies in such manner, and into such classes, as he thinks fit; and the classification of a society under any head of classification by the Registrar shall be final."

It has been submitted that such classification, however, could never include a classification based on religion. What could be the nature of the classification has been stated by making a reference to section 74 C of the Act, which deals with election of members of the committees of certain classified societies, namely, district co-operative banks, primary land development banks, district co-operative sale and purchase organisation, Taluka sale and purchase co-operative organisation, co-operative sugar factories, co-operative spinning mills, district co-operative milk unions and taluka co-operative processing societies. Accordingly, the societies could be validly classified on the basis of the nature of business and/or the activity which one or the other society might undertake.

Section 28 deals with voting powers of the members of a society and it is submitted that when a group of persons hold one membership of the society there can be one membership and one vote for such group. Reference has then been made to Sec. 24 of the Act and rule 5 and rule 12 of the Gujarat Co-operative Societies Rules, 1965. Rule 5 deals with bye-laws. Section 24 and Rule 12 would read as under :-

"24. (1) No society shall, without sufficient cause, refuse admission to membership to any person duly qualified therefor under the provisions of this Act, the rules and bye-laws of such society.

(2) Where the society does not communicate any decision to a person within a period of three months from the date of receipt by the society of his application for admission, such person shall be deemed to have become the member of such society on the expiry of the aforesaid period of three months.

- (3) Where a person is refused admission as a member of a society, the decision together with the reasons therefor shall be communicated in writing to such person by the society within three months from the date of receipt by the society of the application for admission made by such person.
- (4) Any society aggrieved by the admission of a member under sub-section (2) or any person aggrieved by the decision of the society refusing him its membership under sub-section (3) may appeal to the Registrar.
- (5) An appeal under sub-section (4) shall be made within a period of two months from the date of communication to him of the decision of the society, or, as the case may be, from the date of the expiry of the period of three months specified in sub-section (2).
- (6) The decision of the Registrar in appeal shall be final and shall not be called in question in any court."

Rule 12 :

- "12. Open membership - (1) No Seva Sahakari Mandali or Consumers' Society or Co-operative Milk Producers' Society, shall without sufficient cause refuse admission to membership to any person duly qualified therefore under the provisions of the Act and the bye-laws.
- (2) No co-operative housing society shall without sufficient cause, refuse admission to its membership to any person, duly qualified therefore under the provisions of the Act and its bye-laws to whom an existing member of such society wants to sell or transfer his plot of land or house and no such society shall without sufficient cause, refuse to give permission to any existing member thereof to sell or transfer his plot of land or house to another person who is duly qualified as aforesaid to become its member.

Explanation.- A Seva Sahakari Mandali includes a multipurpose society and a primary agricultural credit society."

Reliance has been placed on sub-rule (2) of rule 12. It has been submitted from the reading of the aforesaid provisions that membership has to be open and cannot be restricted without sufficient cause and that such restriction on the ground of religion would obviously be contrary to the provisions contained in the aforesaid provisions of law. The decision in Jain Merchants Co-operative society (supra) has been canvassed both for the aforesaid proposition of law and for dealing with the decisions which have been relied upon on behalf of the petitioners.

11. The first decision which has been relied upon on behalf of the petitioners is contained in the case of Karvenagar S.G.R. Sanstha Maryadit v/s. State reported in AIR 1989 Bombay 392. The learned Tribunal has explained the decision in following manner :-

'In AIR 1989 Bombay 392, the amendment of bye-laws for allowing construction of multi-storeyed building was imposed by the Maharashtra Govt. Notification and it was not voluntary action on the part of the society by a resolution of the general body as in the present case. The facts of the present case in the light of the general body resolution mentioned above, the judgment of Maharashtra Tribunal reported in 1993 CTJ 359 also will not apply to the present case. On similar observations as mentioned above, the judgment of this Tribunal in Revision No. 76/96 also does not apply.'

It has, however, been strenuously argued that Article 19(1)(c) and Article 29(1) of the Constitution of India would support the restriction of the kind in the bye-law in question. Article 19 (1) (c) would read as under :-

'19. Protection of certain rights regarding freedom of speech, etc.- (1) All citizens shall have the right -

xxx xxx xxx xxx

(c) to form associations or unions.'

Article 29(1) would read as under :-

'29. Protection of interests of minorities.- (1)
Any section of the citizens residing in the territory of India or any part thereof having a distinct language, script or culture of its own shall have the right to conserve the same.'

For lending support to the aforesaid argument a reference has been made here also to the aforesaid decision of the Bombay High Court. Following observations have been read from para. 9 of the said decision :-

- '9. Even assuming that the State Government has power to give directions as contained in the notification, still the submission of Dr. Naik that the directions are violative of fundamental rights guaranteed under Art. 19(1)(c) of the Constitution and therefore void requires acceptance. Article 19(1)(c) confers right on all citizens to form association or union and the petitioner society is constituted in exercise of that right. It is absolutely true that the right to form association can be regulated by the provisions of the statute. The petitioner society is registered under the Act and the bye-laws of the society are also registered by the Registrar as the same are in accordance with the requirements of the Act and the Rules. By the impugned notification the Government provides that a member can raise high rising building on the allotted plot and the occupiers of such plot would form a society, which can be described loosely as a sub-society and the representative of such sub-society would be a member of the petitioner housing society. In other words, the Government is compelling the housing society to accept a sub-society on its land and then accept the sub-society as a member of the petitioner society. Dr. Naik complains, and in our judgment with considerable merit that it is not permissible for the State Government to foist any member on the housing society because the right to become a member is to be determined by the managing committee in accordance with the by-laws and Government cannot direct that any person would automatically become a member and that too against the wishes of the members of existing society. The submission is correct. Right to form association conferred under Art. 19(1)(c) is not only limited to the initial formation of the association but also operates in respect of continuance of such association. The direction issued by the State Government infringes upon right of citizen to form and continue the association and to determine who shall be member of such association. The State Government is forcing a member on such association and such

compulsion clearly amounts to infraction of the fundamental rights. Reliance by Dr. Naik on the decision of the Supreme Court reported in AIR 1971 SC 966 (Smt. Damyanti Naranga v. Union of India) is very appropriate. The Supreme Court held :

"The right to form an association, necessarily, implies that the persons forming the association have also the right to continue to be associated with only those whom they voluntarily admit in the association. Any law, by which members are introduced in the voluntary Association without any option being given to the members to keep them out, or any law which takes away the membership of those who have voluntarily joined it, will be a law violating the right to form an association. The Hindi Sahitya Sammelan Act does not merely regulate the administration of the affairs of the original society; what it does is to alter the composition of the society itself. The result of this change in composition is that the members, who voluntarily formed the Association, are now compelled to act in that Association with other members who have been imposed as members by the Act and in whose admission to membership they had no say. Such alteration in the composition of the Association itself clearly interferes with the right to continue to function as members of the Association which was voluntarily formed by the original founders. The Act, therefore, violates the right of the original members of the society to form an association guaranteed under Art. 19(1)(c)."

In our judgment even assuming that the Government has power to issue directive, the directive issued under the impugned notification is clearly violative of Art. 19(1)(c) of the Constitution.'

It may be seen that reliance has been placed on a decision of the Hon'ble Supreme Court in the case of Smt. Damyanti Naranga v. Union of India, reported in AIR 1971 SC 966. Apart from the fact that the observations quoted from Smt. Damyanti Naranga's case (supra) for finding that Article 19(1)(c) of the Constitution would be violated, if any directive is issued by the Government snatching away the volition of the members to form and continue their associations, the very observations also

indicate that the right to form an association is attached with the individuals who become members of the association. Where such associations are created under and governed or controlled by statute, there can be no objection of statutory interference with their composition on the ground of contravention of individual right of freedom of association. See *Daman Singh v. State of Punjab* reported in AIR 1985 SC 973. The Bombay decision in *Karvenagar S.G.R. Sanstha Maryadit* (supra) came to be referred to and the decision in *Smt. Damyanti's case* (supra) came to be considered by a Division Bench of this Court in the case of *Jain Merchant Housing Society Limited v. H.U.F. of Manubhai* reported in 1995 (1) G.L.R. at page 19. This Court while considering the vires of rule 12(2) of the Rules quoted hereinabove, had an occasion to deal with the individual rights guaranteed under Article 19(1)(c) and Article 300A of the Constitution of India and in that context the aforesaid decisions were required to be considered. Following observations might usefully be reproduced from para. 12 of the citation :-

"Mr. Joshi argued that Rule 12(2) of the Rules is not *pari materia* with the language of Sec. 22(2) and Sec. 24 of the Act and that the provisions of Rule 12(2) seek to balance the right guaranteed under Art. 19(1)(c) with that of the right under Art. 300A of the Constitution of India. According to Mr. Joshi provisions of Rule 12(2) are regulatory in nature over the competence of a Society. He has placed reliance on a decision of the Constitution Bench reported in AIR 1985 SC 973 wherein AIR 1971 SC 966 (supra) cited by Mr. Zaveri has been considered and distinguished. In AIR 1985 SC 973 (*Daman Singh v. State of Punjab*) while referring to *Damyanti's case*, i.e., AIR 1971 SC 966 the Supreme Court has observed that in *Damyanti's case* an unregistered society was by statute converted into a registered society, which bore no resemblance whatever to the original society and new members could be admitted in large numbers so as to reduce the original members to an insignificant minority and the composition of the society itself was transformed by the Act and the voluntary nature of the association of the members who formed the original society was totally destroyed and for this reason the Act was struck down by the Court as contravening the fundamental right guaranteed under Art. 19(1)(f). According to the Apex Court the

co-operative societies which are from the inception governed by statute are to be considered on a different footing. According to the decision in Daman Singh's case (AIR 1985 SC 973) the Supreme Court has held as under :

"In the cases before us, we are concerned with co-operative societies which from the inception are governed by statute. They are created by statute, they are controlled by statute and so, there can be no objection to statutory interference with their composition on the ground of contravention of the individual right of freedom of association."

Thus, we are fortified in our view on the strength of the decision of the Supreme Court in Daman Singh's case (supra) particularly having regard to the observations made in para 9 thereof that so far as the composition of the co-operative society is concerned, there cannot be any objection to statutory interference. The composition of the co-operative society certainly covers the issue with regard to the membership and the right of the society to admit, refuse or deny such membership and such decision is also amenable to statutory interference as has been held by the Supreme Court. ...'

12. Even in Karvenagar S.G.R. Sanstha decision (supra) a reference has been made to a quotation from the preface to International Handbook of Co-operative Legislation by Mr. Watkin. The said quotation might here also be reproduced :-

"True co-operation draws its inspiration from realms where the State's writ does not run. Co-operative movements are not created by legislation. Nevertheless, without an appropriate legislative framework a co-operative movement in the form of a growing economic organism is not possible or even conceivable. The right of individuals to associate in co-operative societies and the right of the societies to unite in federations must be recognised..... The legal harness must allow for the free play of fundamental co-operative principles and the normal development of cooperative organisations according to the needs of their members and their own laws of growth."

13. Then there is a quotation from the speech of Sir Denzil Ibbeston introducing Co-operative Credit Societies Bill, 1904, which also might be reproduced :-

"The people must in the main be left to work out their own salvation on their own lines, the function of Government being confined to hearty sympathy, assistance and device."

14. Finally the Bombay Bench has made a reference to the legislation of co-operative which was enacted by introduction of Co-operative Credit Societies Bill, 1904 and which prescribes the basic rule that bye-laws of a co-operative express the real intention of the participating members, and should be framed within the parameter of the Act and the Rules. It has been observed that the co-operative law do not attempt a legal definition of co-operative, but the basic principles of co-operatives are incorporated in the law. The Bench has then proceeded to state that the Commission on Co-operative Principles appointed by the International Co-operative Alliance and which was presided over by the renowned Indian Co-operator, late Prof. D.G. Karve, has re-enunciated these principles as follows :

- "(i) Membership of a co-operative society should be voluntary and available without artificial restriction or any social, political, racial or religious discrimination to all persons who can make use of its services and are willing to accept the responsibilities of membership;
- (ii) Co-operative societies are democratic organisations, their affairs should be administered by persons elected or appointed in the manner agreed by the members;
- (iii) the members should provide for development of the business of the co-operative, provide for common services, and distribute amongst the members the profits made." (emphasis supplied)

15. It might be noticed from the aforesaid principles also that membership of a co-operative society should be voluntary and available without artificial restriction or any social, political, racial or religious discrimination, to all persons who can make use of its services and are willing to accept the responsibilities of membership.

16. A reference has also been made to a Division

Bench decision of this Court in Amreli District Co-operative Sale and Purchase Union v/s. State reported in 1984 (2) G.L.R. 1244. This decision was also relied upon for defending similar restrictions contained in the bye-law which was under consideration by the subsequent Division Bench in Jain Merchants Housing Society Ltd.'s case (supra). Of-course, the decision in Amreli District Co-operative Sale and Purchase Union (supra) was canvassed for saying that a co-operative society has an absolute right to deny or refuse membership to anyone without assigning any reason as it has been held in the aforesaid decision that there is in fact no right, statutory or otherwise, for any person within the area of operation of a co-operative society to become a member and that it is for the society to determine whether a particular person seeking membership should or should not be admitted to the society. Following observations of the later Division Bench (Jain Merchants H.S. Limited) (supra) might be reproduced in answer to the submissions made on behalf of the petitioners on the strength of the above earlier decision in the present case :-

"We have considered the question of the right of

the Society to admit, deny or refuse the membership and in the light of the observations relied upon by Mr. Zaveri and pointed out by Mr. Joshi, we are of the opinion that the contention relating to an absolute and unfettered right in favour of the Society to admit, deny or refuse the membership cannot be accepted for the simple reason that according to this Division Bench decision (1984 (2) GLR 1244) itself as mentioned in para 54 at page 1298 a right to be considered for being a member has been recognised and consideration would always mean a fair consideration. Further, refusal of membership on flimsy and trivial grounds has also been left open to the challenge and the remedy of the aggrieved person and the right to move the Court by regular civil action or civil court or before the Registrar by invoking his special jurisdiction in such cases has been recognised. Once it is held that there is a right to be considered for being a member and the consideration means a fair consideration, it is implicit in the very nature of things that a membership cannot be refused or denied at pleasure and in case the membership is refused on any flimsy or trivial grounds, the matter can be agitated before the Court or the concerned authority. Thus, we find that the society is not

clothed with such unflattered power and if at all the society refuses or denies membership on some flimsy and trivial grounds, it will be open to the aggrieved party to move the court or the authorities under the Act. When there is a right and remedy available to the person, who has been denied the membership, it does not stand to reason to accept the contention of Mr. Zaveri that the petitioner society has any such absolute right. When the aggrieved person approaches the court or the competent authority, there is no basis for the argument that the decision of the society to admit anyone to membership or to deny or refuse the same is not open to challenge." (emphasis supplied).

17. It would therefore, be clear from what is stated above that the concept of membership as envisaged in sec. 24 of the Act read with rule 12, rule 12(2) in particular, of the Rules takes within its sweep right of a person of being a member of a society to be considered fairly and without artificial restriction, or without any social, political, racial or religious discrimination. A restriction in a bye-law to the effect that the membership would be limited to Parsis only would clearly be hit as an unfair restriction which could be validly and legitimately dealt with by the appropriate authorities u/S. 24 of the Act read with rule 12(2) of the Rules. It is, therefore, clear that the Tribunal is right in not upholding such a restriction in the bye-law in question on a prima-facie consideration of the matter.

18. There is another aspect of the matter also and it touches the legality of the restriction contained in the bye-law in question. A reference in this connection may be made to sec. 10 of the Transfer of Property Act, 1882, which reads as under :-

'10. Condition restraining alienation.- Where property is transferred subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest in the property, the condition or limitation is void, except in the case of a lease where the condition is for the benefit of the lessor or those claiming under him; provided that property may be transferred to or for the benefit of a woman (not being a Hindu, Muhammadan or Buddhist), so that she shall not have power during her marriage to transfer or charge the same or her beneficial interest

therein.'

It can be seen that sec. 10 provides that where property is transferred subject to a condition or limitation absolutely restraining the transferee or any person claiming under him from parting with or disposing of his interest in the property the condition is void. Therefore, such a condition imposed by a bye-law on its member that he cannot alienate the property to a non-Parsi person would be prima-facie illegal. Moreover, every citizen has a right under Article 300A of the Constitution of India, to property, and such a right to property is not to be deprived except in accordance with law. Even under Article 19 of the Constitution of India the citizen has a fundamental right to reside and settle down in any part of the Indian territory. If there can be a restriction on such a right, the same could be only by an appropriate legislation. If there is a law made by the appropriate legislature, the same could be examined from the stand point of whether it is reasonable restriction or otherwise. A bye-law being not law cannot restrict the rights of citizens. This is what has been considered by a learned Single Judge of Andhra Pradesh High Court in R. Anjaneyulu v/s. V.G. Raghunathan reported in 1995 C.T.J. 201, which has been considered by the lower authority. The learned Judge has referred to the observations of a Constitution Bench of the Supreme Court in Bhau Ram v/s. Baij Nath Singh and others reported in AIR 1962 SC 1474 dealing with the law of pre-emption as provided by the Rewa State Pre-emption Act. The observations quoted by the learned Single Judge may be reproduced here also :-

"But the Constitution now prohibits discrimination against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them under Art. 15 and guarantees a right to every citizen to acquire, hold and dispose of property, subject only to restrictions which may be reasonable and in the interests of the general public. Though therefor the ostensible reason for pre-emption may be vicinage, the real reason behind the law was to prevent a stranger from acquiring property in any area which had been populated by a particular fraternity or class of people. In effect, therefore, the law of pre-emption based on vicinage was really meant to prevent strangers, i.e., people belonging to different religion, race, or caste, from acquiring property. Such division of society now into groups and exclusion

of strangers from any locality cannot be considered reasonable, and the main reason therefore which sustained the law of pre-emption based on vicinage in previous times can have no force now and the law must be held to impose an unreasonable restriction on the right to acquire, hold and dispose of property as now guaranteed under Art. 19 (1) (f), for it is impossible to see such restriction as reasonable and in the interests of the general public in the state of society in the present day."

19. The bye-laws which were under consideration by the learned Single Judge of the Andhra Pradesh High Court would indicate that no member should be permitted to transfer any share and interest held by him unless the transfer is made to the person, who inter-alia is either serving at present or retired or relieved from the Armed Forces below the officers' rank or who is a widow of Armed Forces personnel of other ranks and the learned Judge after considering the provisions of the sec. 10 of the Transfer of Property Act and the relevant provisions of the Constitution of India held that such a bye-law of the society as would restrict power to alienate the property would be illegal and void. The learned Judge observed :-

"21. As stated above, assuming for the sake of argument that there should be any such restriction on the right of the citizen derogatory to the fundamental rights or even sec. 10 of the Transfer of Property Act on his power to dispose of the property, it must be by a law by appropriate legislature and not by way of bye-laws of the Housing Society."

20. In reply to the aforesaid decision based on Section 10 of the Transfer of Property Act reference has been made to a decision of Privy Council in the case of Mohammad Raza and ors. v. Mt. Abbas Bandi Bibi reported in AIR 1932 Privy Council p. 158. That was a case dealing with terms of compromise reflecting family arrangement arrived at for resolving conflicting claims of the parties to the dispute. In the facts of the case before the Privy Council it was held that the terms of the compromise were binding and that the restriction as to alienation was only partial. It was neither repugnant to law nor to justice, equity and good conscience. In my opinion the decision can have hardly any application to the present case. A distinction between outright transfer and an agreement to transfer immoveable property

has to be borne in mind. A distinction has also to be visualised between an out-right partition and a family arrangement. Following observations in Gummanna Shetty and ors. v. Nagaveniamma, AIR 1967 SC 1595 at page 1598 might be usefully quoted :

"The High Court said that as the deed effected an out-right partition, the conditions restraining alienations were void under Section 10 of the Transfer of Property Act. But the point in issue is whether the deed effected an out-right partition. The restrictions on alienation rather indicate that the parties did not intend to effect an out-right partition, and they wanted a division for convenience of enjoyment on the footing that neither branch had the right to alienate. If the family arrangement took effect as a division for convenience of enjoyment only, and not as an out-right partition, the restrictions on alienations were not hit by Section 10 of the Transfer of Property Act."

In Mohmand Ali v. Baikodar Nath, AIR 1960 Assam 178 reliance has been placed on the Privy Council decision in Mohammad Raza's case (supra). The same would also stand distinguished as above.

21. Finally reference has also been made to a Full Bench decision of this Court in the case of Mulshanker Kunverji Gor & ors. v. Juvansinhji Shivubha Jadeja reported in 20 (1979) G.L.R. 878. The provisions of section 42 of the Act read with sec. 17 of the Indian Registration Act were under consideration. It has been observed that where a society is a 'tenant co-partnership society' transfer of shares in the society necessarily carries with it the transfer of member's interest in the immoveable property allotted to him and that such a transfer can be brought about without a registered instrument, whereas in a 'tenant ownership society' a member transfers his shares in the society to another person alongwith his right to occupy and enjoy the land belonging to society and super-structure which he has constructed out of his personal fund and which belongs to him personally which transfer cannot be effected except under a registered conveyance since exemption contained in section 42 (a) of the Act would not extend to a transfer of a member's personal immoveable property not belonging to the society. In either case some or the other interest in immoveable property is attached with the membership in a co-operative housing society. A classic case of tenant co-partnership housing society was

before the Hon'ble Supreme Court in R.H. Shah v. H.J. Joshi reported in AIR 1975 SC 1470. It has been observed that a flat in a tenant co-partnership housing society under the Maharashtra Co-operative Societies Act is liable to attachment and sale in execution of a decree against a member in whose favour or for whose benefit the same has been allotted by the society. The right to occupy a flat of this type, assumes significant importance and acquires under the law a stamp of transferability in furtherance of the interest of commerce. In absence of clear and unambiguous legal provisions to the contrary, it will not be in public interest nor in the interest of commerce to impose a ban on saleability of these flats by a tortuous process of reasoning. The prohibition, if intended by the legislature, must be in express terms. The Apex Court has observed in para. 19 as under :-

"19. Multi-storeyed ownership flats on co-operative basis in cities and big towns have come to stay because of dire necessity and are in the process of rapid expansion for manifold reasons. Some of these are : ever growing needs of an urban community necessitating its accommodation in proximity to cities and towns, lack of availability of land in urban areas, rise in price of building material, restrictions under various rent legislations, dis-incentive generated by tax laws and other laws for embarking upon housing construction on individual basis, security of possession depending upon fulfillment of the conditions of membership of a society which are none too irksome. In absence of clear and unambiguous legal provisions to the contrary, it will not be in public interest nor in interest of commerce to impose a ban on saleability of these flats by tortuous process of reasoning. The prohibition, if intended by the legislature, must be in express terms. We failed to find one."

22. It would be clear from what is stated above that a restriction based on religion, race or caste contained in a bye-law, on the member's right in a co-operative housing society to transfer his membership coupled with his right to alienate his interest in the immoveable property would be bad in law.

23. SECOND PART of the petitioners' case relates to directions issued by the Registrar and the appeal which is pending before the District Registrar/Appellate

Authority under sec. 24 of the Act. In so far as the same relates to the restriction on the member's right to transfer membership and/or his interest in the property, to a non-Parsi is concerned, the same would stand answered as aforesaid.

24. The last part of the petition is with regard to apprehended construction of commercial complex by the respondent no. 3. Respondent no. 3 is not a party to the proceedings before the Nominee or before the Tribunal. It is, no doubt, true that appeal under Section 24 of the Act is pending before the District Registrar, Co-operative Societies. That apart, even Revision in question is also pending before the learned Tribunal. Therefore, appropriate course would be to have the matter in the first instance being decided by the District Registrar as also by the Tribunal who will hear the Revision Application finally. Respondent no. 3 should be made a party to the said pending Revision Application. No opinion is expressed in respect of the case to be put up by the rival parties on this point.

25. In view of what is stated above, this petition is dismissed with no order as to cost leaving the Revision Application before the Tribunal as also the appeal before the District Registrar being finally decided by the concerned authorities. The respondent no. 3, if not a party to either of the proceedings, shall be made a party respondent in such proceedings. The decision shall be taken by both the authorities after giving an opportunity of hearing to all the concerned parties including respondent no. 3 as aforesaid. The said proceedings shall be so heard and decided as expeditiously as possible preferably within two months from the date of receipt of this direction. Rule is discharged accordingly. Status-quo vacated. No order as to costs. D.S.P.

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Mr. Mihir Joshi, learned advocate for the petitioner seeks extension of status-quo granted earlier in this matter by staying operation of this judgment. The learned advocates for the other side object to this request. Request is granted upto 30/1/1997.

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